SUPREME COURT, U. S.

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No. A-657

In The Supreme Court Of The United States

October Term, 1974

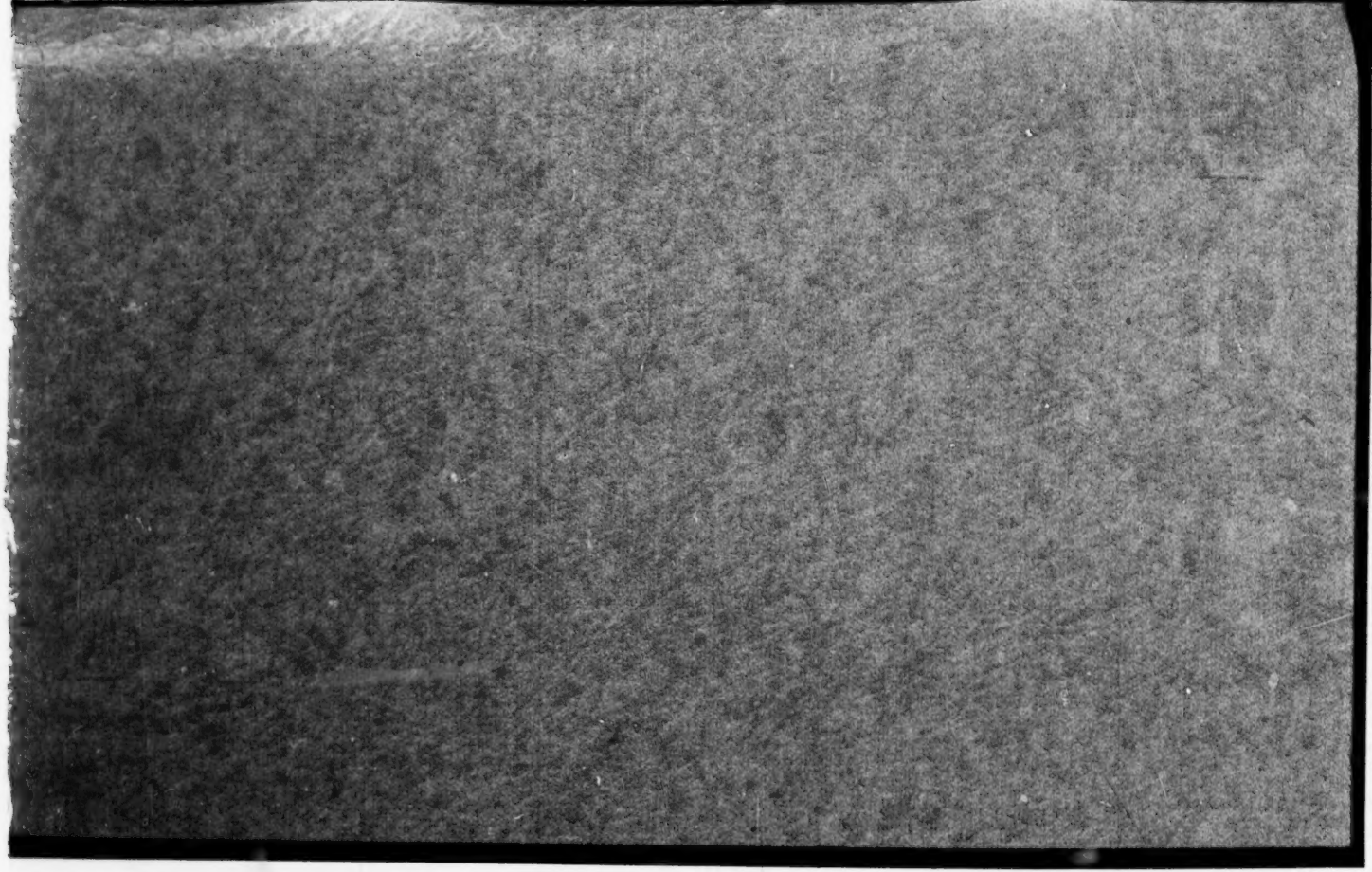
ESTATE OF MILTON S. WYCOFF, Deceased,
ZIONS FIRST NATIONAL BANK, Executor,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BULLOCK AND CLARK
Joseph Jay Bullock,
Attorney for Petitioner
910 Kearns Building
Salt Lake City, Utah 84101



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The Petitioner petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the United States Tax Court (Appendix A, *infra* pp. 8-23) were reported in 50 T.C. 617 (1973).

The opinion of the Court of Appeals (Appendix B, *infra* pp. 24-42), affirming the United States Tax Court, is reported at 506 F. 2d 1144 (1974).

JURISDICTION

The judgment of the Court of Appeals was entered November 19, 1974, (Appendix B, *infra* pp. 24-42). By order dated February 10, 1975, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including March 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether pursuant to Section 2056 of the Internal Revenue Code of 1954, the Commissioner properly reduced the otherwise allowable marital deduction by Federal and State death taxes which could have been, but which were not, charged to the share of the estate passing to the surviving spouse.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are set forth in Appendix C, *infra* pp. 43-46.

STATEMENT

Petitioner, Zions First National Bank, is the duly acting and qualified executor of the Estate of Milton S. Wycoff. Milton S. Wycoff died on March 3, 1966, at Salt Lake City, Utah.

The will of the decedent admitted to probate provided for the distribution of the estate assets to two trusts, one trust, the Marital Trust, for the benefit of his surviving spouse, and the second trust, the Residuary Trust, for the benefit of his son.

Article VI of the will provided for the specific bequest of a portion of the estate assets to the Marital

Trust. The pertinent clause providing for the distribution to the Marital Trust reads as follows:

ARTICLE VI

"If my said wife survives me, I devise, bequeath and appoint to my Trustee, in trust, an amount equal to fifty per cent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes, less the aggregate amount of marital deductions, if any, allowed by reason of interests in property passing, or which have passed, to my wife otherwise than by the terms of this Article of my Will. My executor shall have full authority and discretion to satisfy this gift, devise and bequest, wholly or partly, in cash or kind, and to select and designate and to convey and to assign to my Trustee of said trust the cash, securities or other assets, including real estate and interest therein which shall constitute said trust, provided, however, that in no event shall there be included in said trust any assets or proceeds of any asset with respect to which a marital deduction would not be allowable if so included; and provided further that in selecting and assigning to this Marital Trust the property and assets of which the same shall consist, my Trustee, insofar as is possible and practicable, shall resort first to cash, secondly to debentures or other securities, and thirdly to nonvoting shares of stock in any corporations in which I shall have such shares at the time of my death, and lastly to voting shares of stock in any corporations in which I may have such shares at the time of my death, it being my intention and desire that unless absolutely required to provide a portion of the share of my property required for this Marital Trust, that all of my shares of voting stock in any corporations in which I may hold such shares at the time of my death shall be apportioned to and become a part of my Residuary Trust Estate as created and referred to in this Will. This Trust created for the use and benefit of my wife shall be known as the "Marital Trust" and shall be held and administered and disposed of as follows:..."

Article VII of the will provided for the distribution of the balance of the estate to the Residuary Trust for the benefit of his son. The pertinent clause providing for the distribution of the residue to the Residuary Trust reads as follows:

ARTICLE VII

"If my son, Bruce Wycoff, survives me, I devise, bequeath and appoint all of the rest, residue and remainder of my property, real, and personal and mixed, which I shall own at the time of my death or over which I shall then have power of appointment, to my Trustee, in trust, for the use and benefit of my said son, Bruce, as beneficiary as herein provided, said Trust to be known as the "Residuary Trust", and to be used and administered as follows:..."

Article XII of the will provided a direction to the executor with respect to the payment of expenses and death taxes. Article XII reads as follows:

ARTICLE XII

"I direct prompt payment of the expenses incident to my funeral, burial and last illness, and all my just debts. I further direct that all inheritance, estate and transfer taxes due by reason of my death shall be paid out of that portion of my estate which is not included in the Marital Trust to be administered by my Trustee, unless, in the best business judgment and sole discretion of my executor, such taxes could be more prudently paid from any assets in my estate without respect to what is or is not included in the Marital Trust created by this my Last Will."

The language of the will was such as to seek to maximize the estate tax deduction available under Section 2056 of the Internal Revenue Code of 1954.

Although the executor was given discretion to charge death taxes to the Marital Trust, it did not do so. The Probate Court, having all of the parties in interest before it, decreed the distribution to be the

full marital share unreduced by any death taxes.

The Commissioner of Internal Revenue determined that the applicable death taxes (Federal Estate and Utah Inheritance) paid should be charged to the portion of the estate which would have otherwise passed to the Marital Trust, thus reducing the amount passing to the trust and accordingly, reducing the allowable marital deduction increasing the Federal estate tax.

Petitioner filed a petition with the United States Tax Court which sustained the Commissioner's determination. The Tax Court's jurisdiction was predicated on Section 7442 of the Internal Revenue Code of 1954. Petitioner then appealed to the United States Court of Appeals for the Tenth Circuit where a divided court, two to one, affirmed the decision of the United States Tax Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decision of Sixth Circuit in *Estate of Herbert R. Penney v. Commissioner*, 504 F. 2d 37 (1974).

In *Penney*, the court held in part:

> "In this regard, we note that the cardinal rule of will interpretation in Ohio is to ascertain and give effect to the meaning and intent of the testator's language in his will. 56 O. Jur. 2d Wills § 519 (1963). As mentioned previously, the Commissioner's reading of Ohio law here and with respect to the non-probate assets would result in not only shifting the tax burden, but would also cause reduction of both the marital and charitable deductions as well as an increase in the estate's overall tax liability of $2,344,746.55. In rejecting interpretations which would lead to similar results, both federal

> and state courts have considered the notion that such a result was intended by the testator as being "incredible" and contrary to what one would presume a testator's normal intent to be; that is, to maximize his deductions and minimize his tax liability. *Dodd v. United States*, 345 F. 2d 715 (3d Cir. 1965); *Gesner v. Roberts*, 88 N. J. Super. 278, 212 A. 2d 43 (1965); *Case v. Roebling*, 43 N. J. Super, 545, 127 A. 2d 409 (1956)."

In *Penney*, the will did not contain a "tax clause". The Commissioner contended this omission indicated an intention on the part of the decedent to require a charge of death taxes to the otherwise allowable marital bequest thus reducing the marital deduction for Federal estate tax purposes. The Sixth Circuit rejected this reasoning in view of the otherwise evidenced intent on the part of the decedent to obtain the maximum marital deduction:

> "Examination of Penney's will indicates that he also did not intend the result advocated by the Commissioner. This is particularly evident when it is considered that Item 3 of the will is framed in the traditional language of a formula marital bequest, and, as the Tax Court noted, is "designed to increase to 50 percent of the adjusted gross estate the amount of all property passing to his (decedent's) spouse which qualified for the marital deduction." Under these circumstances we are not persuaded that the result advocated by the Commissioner was intended by the testator as a consequence of the omission of a "tax clause."..."

In *Wycoff*, as in *Penney*, the will contained a provision, although not operative, which provided the Commissioner with a basis for arguing that the amount passing to the surviving spouse should be reduced by

death taxes which she was not in fact charged with. In *Wycoff*, the Tenth Circuit, except for Judge Moore in dissent, disregarded the fundamental rule of probate construction ie., the intent of the testator controls.

The court in *Penney* disregarded alleged deficiencies in the will of the decedent so as to achieve his testamentary intent. In Wycoff, the Tenth Circuit assumed the death taxes were paid out of the Marital Trust notwithstanding a clear intent on the part of the testator not to let such be the case, if the maximum marital deduction would be reduced.

2. Will provisions providing for the obtaining of the maximum marital deduction typified in the instant case and in *Penney* are the sine qua non of modern estate planning. A majority of wills affecting estates in excess of perhaps $120,000.00, contain such clauses. Congress clearly intended that the estate tax be reduced with respect to an amount which the wife in fact obtained for own use. Unless the court resolves the present conflict in the Circuits the surviving spouses of Messrs. Wycoff and Penney will be taxed differently even though each husband directed and intended that his will should be interpreted and his estate administered so as to obtain the maximum marital deduction and to pay the least possible federal estate tax.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Joseph Jay Bullock,
Attorney for Petitioner

March 1975

Appendix A

UNITED STATES TAX COURT

59 T.C. 617

ESTATE OF MILTON S. WYCOFF, DECEASED, ZIONS FIRST NATIONAL BANK, EXECUTOR, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 5532-70. Filed February 1, 1973.

Decedent's will directed that all death taxes be paid out of that portion of his estate which was not included in the marital trust; however, the will also provided that if in the best business judgment and sole discretion of his executor, such taxes could be more prudently paid from assets of the estate without respect to what was or was not included in the marital trust, they should be so paid.

Held, that the value of the interest of the surviving spouse in property passing to her from the decedent must be reduced in computing the amount of the marital deduction under sec. 2056, I.R.C. 1954, by the amount of death taxes which could potentially have been paid from the marital trust as of the decedent's date of death.

FAY, *Judge:* Respondent determined a deficiency in the Federal estate tax of petitioner in the amount of $57,458.30.

The sold issue for our consideration is whether in determining the value of the marital deduction to which petitioner is entitled there must be a reduction for inheritance, estate, and transfer tax liabilities because of the executor's power to use marital trust assets for their payment.

FINDINGS OF FACT

Some of the facts have been stipulated, and the stipulation of facts, together with exhibits attached thereto, is incorporated herein by this reference.

Milton S. Wycoff (hereinafter sometimes referred to as the decedent) died on March 3, 1966, at Salt Lake City, Utah. Zions First National Bank is the duly acting and qualified executor of the Estate of Milton S. Wycoff, deceased, and at the time of filing of the petition herein had its principal place of business in Salt Lake City, Utah. Zions First Natinal Bank filed the requisite Federal estate tax return for the Estate of Milton S. Wycoff with the district director of internal revenue, Salt Lake City, Utah.

The decedent was survived by his wife, LaPearl Weeter Wycoff, and one son, Bruce Wycoff. Both the wife and son were living at the date of the petition filed herein.

On March 30, 1966, the will of the decedent was admitted to probate in the District Court, Probate Division, Salt Lake County, State of Utah. Letters testamentary were granted on March 30, 1966, naming Zions First National Bank, Salt Lake City, as executor of the Estate of Milton S. Wycoff.

As of March 3, 1966, the decedent owned 91,830 of 150,000 shares, or approximately 61 percent, of Wycoff Company, Inc., an operating motor carrier.

Wycoff Company owned all but four shares of Mountain Service, Inc., which corporation owned and leased trucks to Wycoff Company. The decedent owned the remaining four shares.

As of March 3, 1966, the decedent owned 11,010 of 20,000 shares, or approximately 55 percent, of Wycoff Corporation, which corporation owns the real property used by Wycoff Company.

As of March 3, 1966, the decedent owned 9,810 of 17,162 shares, or approximately 57 percent, of Wycoff Warehouse, Inc., a public warehouse corporation.

The decedent's will created a marital trust for the surviving wife, giving her the income for life with a testamentary power to appoint the corpus and all accrued and undistributed income.

The decedent's will, in pertinent part, provided:

ARTICLE VI

> If my said wife survives me, I devise, bequeath and appoint to my Trustee, in trust, an amount equal to fifty percent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes * * * [I]n selecting and assigning to this Marital Trust the property and assets of which the same shall consist, my Trustee, insofar as is possible and practicable, shall resort first to cash, secondly to debentures or other securities, and thirdly to nonvoting shares of stock in any corporations in which I shall have such shares at the time of my death, and lastly to voting shares of stock in any corporations in which I may have such shares at the time of my death, it being my intention and desire that unless absolutely required to provide a portion of the share of my property required for this Marital Trust, that all of my shares of voting stock in any corporation in which I may hold such shares

at the time of my death shall be apportioned to and become a part of my Residuary Trust Estate as created and referred to in this Will. This Trust created for the use and benefit of my wife shall be known as the "Marital Trust" and shall be held and administered and disposed of as follows:

First: I direct that income from the Marital Trust * * * shall be paid to my wife in convenient installments but not less frequently than quarter-annually during her lifetime.

* * * * * *

Third: Upon the death of my said wife, all accrued and undistributed income of the Marital Trust shall be paid and distributed by said Trustee unto the person or persons who my said wife by her Last Will and Testament may designate, nominate, and appoint to receive the same * * * [A]nd further upon the death of my said wife the entire remaining corpus of the Marital Trust shall be paid and distributed by said Trustee to the person or persons who my said wife, by her Last Will and Testament, shall designate, nominate and appoint to receive the same * * *

* * * * * *

ARTICLE VII

If my son, Bruce Wycoff, survives me, I devise, bequeath and appoint all of the rest, residue and remainder of my property * * * to my Trustee, in trust, for the use and benefit of my said son, Bruce, as beneficiary as herein provided, said Trust to be known as the "Residuary Trust" * * *

* * * * * *

ARTICLE XII

> I direct prompt payment of the expenses incident to my funeral, burial and last illness, and all my just debts. *I further direct that all inheritance, estate and transfer taxes due by reason of my death shall be paid out of that portion of my estate which is not included in the Marital Trust to be administered by my Trustee, unless, in the best business judgment and sole discretion of my executor, such taxes could be more prudently paid from any assets in my estate without respect to what is or is not included in the Marital Trust created by this my Last Will.* [Emphasis added.]

The decedent in his will indicated a preference as to which assets were to go to the marital trust so that his surviving spouse would not have to be involved in decisions relating to the family business.

Since the date of death, the executor has not directed that any inheritance, estate and transfer taxes be paid from assets which would otherwise be included in the marital trust. However, petitioner has elected to pay the estate tax liability as reflected on the estate tax return in ten equal yearly installments and all of those installment payments have not yet been completed.

Most of the assets owned by the decedent at his death were nonliquid. On November 6, 1968, the board of directors of Wycoff Company voted to issue a stock dividend in the form of .012 shares of 7 percent preferred stock for each share of common stock outstanding, both Class A and Class B. Shortly thereafter 1,800 shares were issued, and on December 2, 1968, the preferred stock was called. The 1,800 shares were redeemed at $100 per share. The purpose of the stock dividend and redemption was to provide

the estate with cash to pay the costs of administration and part of the estate's tax liability.

On December 31, 1968, the District Court, Probate Division, entered its Decree of Distribution, thereby distributing the residue of the decedent's estate to Zions First National Bank as trustee for two trusts created by the decedent's will, one for the surviving spouse and one for the surviving son.

On September 9, 1970, petitioner filed a Petition for Order Approving Distribution of Property with the District Court, Probate Division, Salt Lake County, State of Utah. The District Court issued its Order Approving Distribution of Property on September 30, 1970.

The property passing to the wife of the decedent other than the terms of the will relating to the marital trust, and taken into account and valued for Federal estate tax purposes, is as follows:

(a)	Property	Amount
	Personal residence	$35,000.00
	Automobile	2,620.00
	Insurance proceeds - Mutual Life Ins. Co. of New York	22,133.47
	Cash - joint tenancy property	392.26
		$60,145.73
(b)	Property - Other Insurance	
	Northwestern Mutual Life Insurance Policy	$ 4,985.25

The property distributed to the marital trust under the terms of the will, with the values as finally determined for Federal estate tax purposes, is as follows:

Property	Amount
Cash	$ 3.84
37,214 shares, Wycoff Co., Class B	148,669.93
2,582 shares, Wycoff Corp., non-voting	30,493.42
24,014 shares, Wycoff Co., Class B	95,935.93
2,923 shares, Wycoff Corp., non-voting	34,520.63
	$309,623.75

ULTIMATE FINDING OF FACT

At the time of the decedent's death, the executor had the power to utilize any assets in the estate for the payment of inheritance, estate and transfer taxes without respect to what assets were to be included in the marital trust.

OPINION

The sole issue for our consideration is whether in determining the value of the marital deduction to which the petitioner is entitled there must be a reduction for inheritance, estate, and transfer tax liabilities because of the executor's power to use marital trust assets for their payment.

Section 2056(a)[1] allows a "marital deduction" from a

1 All section references are to the Internal Revenue Code of 1954 unless otherwise indicated.

> SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.
>
> (a) Allowance of Marital Deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

decedent's gross taxable estate for the value of interests in property passing from the decedent to his surviving spouse.

Congress in creating the marital deduction intended to equalize the effect of the estate taxes in community property and common law jurisdictions. See *United States* v. *Stapf*, 375 U.S. 118 (1963); H.Rept. No. 1274, 80th Cong., 2d Sess., pp. 24-26; S.Rept. No. 1013, 80th Cong., 2d Sess., pp. 26-29.

> To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. * * * The purpose * * * is * * * to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. *Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate.* * * * [Emphasis added.] *[United States v. Staph, supra* at 128.]

To effectuate this purpose Congress provided that for purposes of section 2056 (a) the valuation of the interest passing to the surviving spouse must be governed by section 2056 (b) (4).[2]

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2 SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.—

* * * * * * *

(4) Valuation of Interest Passing to Surviving

Continued next page

In cases where the value of the interest passing will be affected by the payment of estate, succession, or inheritance taxes, section 2056(b) (4) (A) provides the rule for making a valuation determination.

> In computing the marital deduction allowed by section 2056(a), section 2056(b) (4) (A) provides that the effect of any estate, succession, or inheritance taxes, including the Federal estate tax, shall be taken into account in valuing any interest in property passing to the surviving spouse and qualifying for the marital deduction. [*Estate of Frank Pangas*, 52 T.C. 99,101 (1969)]

As we see it the problem in the case at bar is essentially one of valuation—that is, what was the value of the property passing to the wife at the time of death? This Court and a number of others, after considering the statutory provision, have concluded that the deduction is based upon the net value of the

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2. continued from previous page

> Spouse.—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—
>
> (A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and
>
> (B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

bequest to the wife which in turn is affected by the liability of the bequest for the payment of debts, taxes, etc. See *Estate of Newton B. T. Roney*, 33 T.C. 801 (1960), affirmed per curiam 294 F.2d 774 (C.A. 5, 1961) *Thompson Wiseman*, 233 F.2d 734 (C.A. 10, 1956); and *United States* v. *Staph, supra*, which dealt with valuation section 2056(b) (4) (B).

In the case at bar, at the time of decedent's death Article XII of the decedent's will directed the executor in his sole discretion to pay death taxes without respect to what was or was not included in the marital trust. Therefore, at the time of decedent's death the interest passing to the wife was potentially liable for all of the death taxes that might have been asserted. In order to comport with the purpose of the marital deduction it is proper to reduce the value of the interest passing for purposes of section 2056(a) by the amount of this liability. Were we to do otherwise the estate would receive a marital deduction for amounts which could be used for the payment of taxes. These amounts may never find their way into the surviving spouse's gross estate and the purpose of the marital deduction would be thwarted.

Whether any estate taxes are payable from surviving spouse's interest is a matter governed by state law. *Riggs* v. *DelDrago*, 317 U.S. 95 (1942); *Estate of Frank Pangas, supra;* and *Estate of Albert L. Rice*, 41 T.C. 344 (1963), modified sub nom. *Boston Safe Deposit and Trust Co.* v. *Commissioner*, 345 F.2d 625 (C.A. 1, 1965).

The decedent clearly intended that his executor possess absolute power to commit the assets of the marital trust to the payment of death taxes if he saw fit to do so. It is equally clear that under Utah

State Law the decedent's will must be interpreted to give effect to the decedent's expressed intention. See Utah Code Annotated, secs. 74-2-1, 74-2-9; and *In Re Johnson's Estate*, (Sup. Ct. Utah), 228 P. 748 (1924). We can find nothing in Utah State law which would negate the power granted to the executor in the decedent's will.

Petitioner's reliance on *Estate of Amory Lawrence Haskell*, 58 T.C. 197 (1972), on appeal (C.A. 3, Nov. 21, 1972) is misplaced. In that case the Court held that a New Jersey State transfer inheritance tax should not be apportioned for purposes of section 2056(b) (4) (A) so as to reduce the amount of the interest passing to the wife and qualifying for the marital deduction. The Court specifically found that the testator intended that his wife receive an amount equal to the maximum marital deduction and that "Nothing contained in the will of the decedent indicates an intention contrary to his intent to afford his estate the maximum marital deduction." *Estate of Amory Lawrence Haskell, supra* at 200. In the case at bar Article XII of the decedent's will very clearly indicates an intention contrary to affording the estate the maximum marital deduction if the executor in his sole discretion deemed it necessary.

Petitioner further contests the respondent's method of applying section 2056(b) (4) (A) so as to value the interest at the date of the decedent's death. It contends that it is improper to reduce the value of the section 2056(a) deduction by liabilities that may never have to be met out of the marital trust property. Relying on *Weyenberg* v. *United States*, 135 F.Supp. 299 (E.D. Wisc. 1955), it agrues that the interest passing to the wife should reflect the effect of only those taxes which are actually charged, paid from, or

chargeable to the interest passing to the spouse. In effect it argues that events occurring after the decedent's death should affect the valuation of the interest passing to the wife. The *Weyenberg* case found that where a Wisconsin County Probate Court determined a widow's share to be an amount unreduced by Federal estate taxes and the executors actually distributed such portion of the estate to the widow, the county court decree had become final and was conclusive upon the Federal taxing authorities.

In the case of *United States* v. *Mappes*, 318 F.2d 508, 510-511 (C.A.10, 1963), the court was faced with a probate court's final determination that an interest passing to a spouse was not a terminable interest for purposes of the marital deduction. The court in determining the proper Federal tax consequences refused to rely on the probate court decree.

> For the purpose of determining whether the interest which passed to the spouse was a terminable interest, within the meaning of the federal statute, we must first determine the nature and extent of the interest which passed at the instant of the testator's death, not the interest given by the decree of the Probate Court. * * *

The *Mappes* case makes it clear that for purposes of the marital deduction whether an interest passing to the surviving spouse qualifies is a question which must be determined at the time of the decedent's death. It is not a determination affected by later events which may or may not happen. The case of *Estate of Albert L. Rice*, *supra*, stands for the application of this proposition to the valuation area. In that case a marital deduction was limited to the interest passing

to the surviving spouse reduced by its apportioned share of Federal estate and state inheritance taxes. This was so in spite of the fact that the trustee exercised his discretionary power and paid all of the taxes from the assets of the nonmarital trust.

The *Rice* case is sound authority for the proposition that for purposes of the marital deduction, valuation of the interest which passes to the surviving spouse is determined at the moment of the decedent's death. We adopt its reasoning in the case at bar.

> Brief as is the instant of death, the court must pinpoint its valuation at this instant–the moment of truth, when the ownership of the decedent ends and the ownership of the successors begins. * * * [*United States* v. *Land*, 303 F.2d 170, 172 (C.A. 5, 1962)]

While the effect of section 2056(b) (4) (A) is sufficient to dispose of the issue herein, see *Lewald* v. *United States*, 245 F.Supp. 336 (S.D. N.Y. 1965), we feel it is appropriate to also address ourselves to respondent's more heavily relied on alternative argument. In his alternative argument respondent assumed that the value of the marital trust for purposes of the section 2056(a) deduction was not affected by section 2056(b) (4) (A). Respondent therefore applied section 2056(b) (1) to the interest in trust which passed to the wife and achieved the same result as that dictated by the effect of section 2056(b) (4) (A).

With several exceptions no marital deduction is allowed for interests which are defined as "terminable" under section 2056(b) (1). One of these exceptions, as

found in section 2056(b)(5), [3] is the transfer of a life estate with power of appointment in the surviving spouse.

In order to qualify for this exception to the general rule the power transferred to the surviving spouse must be a power to appoint "the entire interest, or such specific portion thereof" and "exercisable by such spouse alone and in all events."

It is respondent's alternative contention that since the decedent empowered his executor in his "best business judgment and sole discretion" to use "any

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3 SEC. 2056(b). Limitation in the Case of Life Estate or Other Terminable Interest.—

(5) Life Estate with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

assets in my estate without respect to what is or is not included in the Marital Trust" for the payment of taxes, the marital trust interest which passed to the surviving spouse did not invest in the spouse the requisite power as to that portion of the marital taxes. Respondent argues that deductions are a matter of legislative grace, *New Colonial Co.* v. *Helvering*, 292 U.S. 435 (1934), and where the taxpayer seeking the benefit of the deduction does not meet every condition imposed by Congress to claim to the deduction must fail.

In numerous instances wherein the surviving spouse's power was limited because of the presence of a trustee's power to invade, the courts have held that all of the requirements of section 2056(b)(5) had not been met and the deduction under that section was inappropriate. See for example *Estate of Morton H. Spero*, 34 T.C. 1116 (1960); *Wilson* v. *United States*, 343 F.2d 929 (Ct. Cls. 1965); *Estate of Frank E. Tingley*, 22 T.C. 402 (1954), affd. sub nom. *Starrett* v. *Commissioner*, 223 F.2d 163 (C.A. 1, 1955); *Estate of Raymond Parks Wheeler*, 26 T.C. 466 (1956); and *Estate of Allen L. Weisberger*, 29 T.C. 217 (1957).

We agree with respondent's contention that the power of the decedent's wife in the present case was not exersicable by her "alone and in all events" and that the exception to the terminable interest rule found in section 2056(b)(5) is inapplicable to the extent that the marital deduction trust could have been appropriated to the payment of taxes. 4

Decision will be entered under Rule 50.

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4. Petitioner argues that in order for the wife's power to not qualify under sec. 2056(b)(5) the trustee must be able to appoint part of the interest "to any person other than the

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surviving spouse" and that the United States of America or the Utah State Tax Commission is not a "person" as defined by sec. 7701(a)(1). Therefore, the trustee's power to invade the marital trust for purposes of paying taxes was not such a power which would limit and disqualify the wife's power within the terms of sec. 2056(b)(5). This argument is of no substance. Sec. 7701(a)(1) defines the term "person" for purposes of the Code "to mean and *include* an individual, a trust, estate, partnership, association, company, or corporation." [Emphasis added] That Code section does not exclude any particular thing from qualifying as a person for purposes of the Code; it merely describes some of the things which the definition may include.

The Supreme Court in *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) in referring to the definition of "person" as found in the Code stated, "Whether the word 'person' . . . includes a state or the United States depends upon the connection in which the word is found."

In order to best carry out the express purpose of the marital deduction, the word "person" as found in sec. 2056(b)(5) must include the United States or a state in the context of the case at bar.

APPENDIX B

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

January Term 1974
No. 73-1901

ESTATE OF MILTON S. WYCOFF, Deceased, ZIONS FIRST NATIONAL BANK, Executor,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the judgment
of the United States
Tax Court
(Tax Court Docket No. 5532-70)

Before LEWIS, Chief Judge, and MOORE* and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

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* Honorable Leonard P. Moore, Senior Judge, United States Court of Appeals, Second Circuit, New York, New York, sitting by designation.

This is a federal estate tax case, and the issue is whether the United States Tax Court ruled correctly in determining that the value of the marital deduction available to the estate must be reduced to the extent of inheritance, estate and transfer taxes that the executor was authorized by the will to pay out of the marital trust even though he was not required in the will to pay it from the marital share.

The will of decedent, Milton S. Wycoff, created two trusts. One was in favor of his wife amounting to 50% of his adjusted gross estate; the other trust dealt with the residue of the estate for the benefit of his son. While he directed that inheritance, estate and transfer taxes were to be paid out of the portion of his estate which was not in the marital trust, he, at the same time, granted the executor a discretion to pay these taxes out of this trust estate if the executor considered it prudent from a business standpoint to do so. Based on this authorization, both the Commissioner and the

Tax Court ruled that the amount of the marital deduction had to be reduced by the amount of the death taxes. The executor now seeks reversal of the Tax Court ruling.

Decedent died on March 3, 1966 and his will was admitted to probate on March 30, 1966, Zions First National Bank of Salt Lake City being named as the executor. A large part of the estate was composed of shares in the family corporations. The trust in favor of the wife gave her income for life and the power to appoint the corpus together with accrued and undistributed income. The language of the will was such as to seek to maximize the estate tax deduction available under § 2056 of the Internal Revenue Code. A further provision in the will[1] directed that the liquid

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1. ARTICLE VI of the will reads as follows:

> If my said wife survives me, I devise, bequeath and appoint to my Trustee, in trust, an amount equal to fifty percent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes * * * [I]n selecting and assigning to this Marital Trust the property and assets of which the same shall consist, my Trustee, insofar as is possible and practicable, shall resort first to cash, secondly to debentures or other securities, and thirdly to nonvoting shares of stock in any corporations in which I shall have such shares at the time of my death, and lastly to voting shares of stock in any corporations in which I may have such shares at the time of my death, it being my intention and desire that unless absolutely required to provide a portion of the share of my property required for this Marital Trust, that all of my shares of voting stock in any corporation in which I may hold such shares at the time of my death shall be apportioned to and become a part of my Residuary Trust Estate as created and referred to in this Will. This Trust created for the use and benefit of my wife

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assets were so far as possible to be given to the wife's trust; this was so as to avoid her having to participate in the family businesses. The residuary trust in favor of the son was created in ARTICLE VII of the will.[2]

Death taxes were directed to be paid out of the non-marital trust portion of the estate but, as explained above, the executor was empowered to pay these taxes out of the widow's trust should he consider it prudent to do so.

ARTICLE XII provided:

> I direct prompt payment of the expenses

Continued from previous page

> shall be known as the "Marital Trust" and shall be held and administered and disposed of as follows:
>
> First: I direct that income from the Marital Trust . . shall be paid to my wife in convenient installments but not less frequently than quarter-annually during her lifetime.
>
> * * * * * * * *
>
> Third: Upon the death of my said wife, all accrued and undistributed income of the Marital Trust shall be paid and distributed by said Trustee unto the person or persons who my said wife by her Last Will and Testament may designate, nominate, and appoint to receive the same . . . [A]nd further upon the death of my said wife the entire remaining corpus of the Marital Trust shall be paid and distributed by said Trustee to the person or persons who my said wife, by her Last Will and Testament, shall designate, nominate and appoint to receive the same . . .

2. ARTICLE VII. If my son, Bruce Wycoff, survives me, I devise, bequeath and appoint all of the rest, residue and remainder of my property . . . to my Trustee, in trust, for the use and benefit of my said son, Bruce, as beneficiary as herein provided, said Trust to be known as the "Residuary Trust" . . .

> incident to my funeral, burial and last illness, and all my just debts. I further direct that all inheritance, estate and transfer taxes due by reason of my death shall be paid out of that portion of my estate which is not included in the Marital Trust to be administered by my Trustee, unless, in the best business judgment and sole discretion of my executor, such taxes could be more prudently paid from any assets in my estate without respect to what is or is not included in the Marital Trust created by this my Last Will.

Though he was given discretion to pay the death taxes out of the wife's trust, the executor has not elected to do so. The Probate Court decreed the distribution of the corpus of the estate to the Zions First National Bank as trustee of the two trusts on December 31, 1968.

Some time later, May 25, 1970, the District Director of Internal Revenue gave the bank notice that there was a deficiency in the amount of $57,458.30. Shortly thereafter, the appellant sought a redetermination of the deficiency by the Tax Court. However, that tribunal ruled that in computing the marital deduction, the value of the interest of the surviving spouse had to be reduced by the amount of the death taxes which could have been paid from the widow's share. The deficiency was ruled to be in the amount of $54,888.31.

The cause was then appealed to this court pursuant to 26 U.S.C. § 7482.

The appellant raises two points on appeal:

The first is that § 2056(b)(4) of the Internal Revenue Code of 1954 does not require that the marital deduction be reduced where, as here, the death taxes have not in fact been paid by the estate or are not chargeable to it.

The second contention is that the interest transferred to the surviving spouse qualifies for the marital deduction on the basis of being a § 2056(b)(5) exception to the terminable interest prohibition of §2056(b).

I

THE ISSUE AS TO WHETHER THE MARITAL SHARE REMAINS INTACT AS A DEDUCTION UNLESS IT IS ACTUALLY INVADED FOR THE PURPOSE OF PAYMENT OF DEATH TAXES

The provision which gives rise to the marital deduction is § 2056 of the Internal Revenue Code of 1954 which provides as follows:

> § 2056. *Bequests, etc, to surviving spouse*
>
> (a) *Allowance of marital deduction* - For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.
>
> (c) *Limitation on aggregate of deductions.*—
>
> (1) *General rule.*— The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50% of the value of the adjusted gross estate, as defined in paragraph (2).

The purpose of Congress in creating this deduction was to stem the tide of state law changes in the community property system. The effect of the change was to give non-community property state citizens the tax advantages which were then enjoyed only by the community property state citizens. The deduction allows married couples' property to be taxed in two stages upon the death of the decedent and upon the death of the surviving spouse. Thus, the marital deduction is restricted to the property interest includable in the surviving spouse's gross estate. United States v. Staph, 375 U.S. 118, 84 S.Ct. 248 (1963).

Accordingly, if the property transferred to the surviving spouse is terminable and thereby is not includable in the gross estate of the surviving spouse, there is no marital deduction. Also, if any part of the property transferred to the surviving spouse is used to pay inheritance taxes, the value of the marital deduction is reduced by the amount of the taxes so paid.

Section 2056(b) provides in part:

> (4) *Valuation of interest passing to surviving spouse.* In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section -
>
> > (A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest;

We are required to determine the value of the deductible non-terminable interest in the property

which passed to the surviving spouse. In turn, we must decide whether the executor's authority to use marital trust assets for the payment of the state and federal death taxes served to reduce the marital deduction in this amount. The bank contends that § 2056(b)(4) is subject to the interpretation that the marital deduction is to be reduced only to the extent that the federal estate or state inheritance tax was actually paid from or charged to the marital share. Its further claim is that the language of § 2056(b)(4) supports this.

It is pointed out that the provision is entitled "valuation of interest passing to surviving spouse." It is argued that the purpose was to restrict the effect on the surviving spouse's marital deduction to the amount of taxes actually paid. The only relevant consideration in applying § 2056 (b)(4), so it is argued, is whether the property interest passed to the surviving spouse was in fact utilized to pay the taxes.[3]

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3. Taxpayer cites the following regulations to support its argument that a reduction is not required for taxes which merely could have been (but were not) paid from a portion of the marital share:

§ 20.2056(b)-4(A) The marital deduction may be taken only with respect to the net value of any deductible interest which passed from the decedent to his surviving spouse, the same principles being applicable as if the amount of a gift to the spouse were being determined.

§ 20.2056(b)-4(C)(2) For example, assume that the only bequest to the surviving spouse is $100,000 and the spouse is required to pay a state inheritance tax in the amount of $1500. If no other death taxes affect the net value of the bequest, the value for the purpose of the marital deduction is $98,500.

§ 20.2056(b)-4(C)(4) If the decedent bequeaths his residuary estate, or a portion of it, to his surviving spouse, and his will contains a direction that all death taxes shall be payable out of

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The regulations relied on by the bank and quoted below are not germane because the thrust of them is to explain the computation of the marital deduction rather than the effect of the taxes payable out of it.

Also, the cases hold that the marital deduction is to be strictly construed. Commissioner v. Bosch, 387 U.S. 456, 464, 87 S.Ct. 1776, 1782 (1967). Another relevant rule of construction is that the taxpayer has the burden of proof to establish compliance with the specific statutory requisites and the taxpayer must prove the applicability of the deduction or exception claimed. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440, 54 S.Ct. 788, 790 (1934).

Furthermore, in determining whether an interest of the surviving spouse is entitled to the marital deduction, the time of death of the decedent governs the tax consequences. Jackson v. United States, 376 U.S. 503, 84 S.Ct. 869 (1964); Boston Safe Deposit and Trust Co. v. Commissioners, 345 F.2d 625 (1st Cir. 1965). *See also* 26 C.F.R. 20.2056(b)-4(a) (1972) and In Estate of Albert L. Rice, 41 T.C. 344 (1963), wherein this principle was applied in valuing a property interest.

The value of the marital deduction and the effect of death taxes upon the extent of the marital deduction are to be determined as a matter of federal law. Thus,

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the residuary estate, the value of the bequest, for the purpose of the marital deduction, is based upon the amount of the residue as reduced pursuant to such direction, if the residuary estate, or a portion of it, is bequeathed to the surviving spouse, and by the local law the federal estate tax is payable out of the residuary estate, the value of the bequest, for the purpose of the marital deduction, may not exceed its value as reduced by the federal estate tax.

the orders of state probate courts are not applicable. In this instance the Utah Probate Court ordered the executor to distribute to the widow's trust 50% of the adjusted gross estate unreduced by any federal estate or Utah inheritance taxes. The court also decreed that such taxes were to be charged to the property not included in the marital trust.[4]

It is conceded by the bank that ARTICLE XII is ambiguous. In one sentence it directs that the inheritance and estate taxes are to be paid out of that portion of the estate not part of the wife's trust but subsequently states that the executor can, in the exercise of business judgment, pay such taxes out of the marital share. The bank is not deterred. It argues that the death taxes should not reduce the marital share since there is not a clear direction to the executor to pay taxes from the marital assets. It must be concluded, however, that since the will speaks as of the date of death, and since it does authorize the payment of taxes from the marital trust within the executor's discretion, it serves the interest of precision and definiteness as well as avoidance of uncertainty to rule that the authorization to pay death taxes from the marital share by its very existence reduces the marital share. In the absence of a clear and unambiguous direction in the will, property transferred to the surviving spouse must bear part of the estate tax burden. *See* Thompson v. Wiseman, 233 F.2d 734

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4. Although federal law governs payability of estate tax, the impact of the federal tax is governed by state law. Riggs v. DelDrago, 317 U.S. 95, 63 S.Ct. 109 (1942); Thompson v. Wiseman, 233 F.2d 734 (10th Cir. 1956). Thus, the apportionment of payment of death taxes is governed by state law.

(10th Cir. 1956).

In Thompson v. Wiseman, *supra*, the will directed that decedent's debts and expenses "be paid out of my estate as soon after my demise as conveniently may be done." We ruled in that case that the language of the will, although ambiguous, gave the executor discretion to pay taxes from the marital assets if this procedure would further the efficient and convenient administration of the estate. *See also* Greene v. United States, 476 F.2d 116 (7th Cir. 1973).

The directive in the will at bar authorizing payment of death taxes dispels the executor's claim that decedent failed to vest authority in the executor to apply marital trust assets to the payments of death taxes. The existence of the authority is out of harmony with the notion that the decedent firmly directed the executor to pay taxes out of funds other than marital ones so as in all circumstances to secure the greatest possible marital deduction. *Cf.* Bauknecht v. Kellogg-Citizens National Bank, 49 Wis. 2d 392, 182 N.W.2d 238 (1971).

Although ARTICLE XII of the will expresses a preference for payment of the taxes from that part of the estate not included in the marital trust, this is much less than a positive direction that death taxes be paid from that part of the estate not included in the marital share, and as we view it such an express provision would be necessary to justify a ruling for the executor. For an example of the kind of an express provision that is needed *see* In Estate of Leeds, 54 T.C. 781 (1970).5

5. The court there said:

> My said Executor shall also pay from my estate all federal estate tax from whomsoever due and however

Since we do not have a positive expression in the will we must rule that § 2056(b)(4) renders the marital share available to the surviving spouse subject to the payment of death taxes. As a result of this, the value of the marital deduction is reduced by the amount of these death taxes.

II.

THE PETITIONER'S CONTENTION THAT THE EXCEPTION TO THE TERMINABLE INTEREST-PROVISION 2056(b) (5), APPLIES AND RESULTS IN A DEDUCTION OF THE ENTIRE MARITAL SHARE UNREDUCED BY DEATH TAXES

> assessed, and all estate, succession, legacy, and inheritance tax, but in so doing said taxes shall be paid from other property than that given and devised to my wife or from life insurance received by her, so that any property received by her as the result of my death will not be reduced by the payment of said taxes, and for the further reason that my estate may get the full benefit of the marital deduction as defined in the Federal Estate Tax Reduction Act of 1948.[6]

6. Section 2056(b)(5) reads as follows:

> (5) *Life estate with power of appointment in surviving spouse.*

In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whethe or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

The mentioned section provides that terminable interests passing to a surviving spouse do not qualify for the marital deduction under 26 U.S.C. § 2056(a). At the same time, an exception exists where the surviving spouse receives a life estate coupled with the power to appoint by will (or during life). To qualify, this power of appointment must be exercisable by the spouse alone with no power in any other person to appoint any part of the interest to any person other than the surviving spouse. The surviving spouse here fulfills these requirements in that she receives a life estate in the marital trust plus the power to appoint the remainder. It is argued that since the surviving spouse fulfills these requirements, that the entire marital share bequeathed to the wife is embraced by the terminable interest exception. An obvious answer is that due to the authority granted the executor to pay the death taxes from the marital share, the amount of the death taxes must be excluded from the marital deduction. The fact that the executor did not choose to exercise the discretion granted to use the marital funds to pay the taxes is inconsequential since the determination as to whether an interest qualified for the deduction is to be made at the time of the

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(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

decedent's death. Jackson v. United States, *supra*, Allen v. United States, 359 F.2d 151 at 154 (2d Cir. 1966), *cert. denied*, 385 U.S. 832; United States v. Mappes, 318 F.2d 508 at 511 (10th Cir. 1963).

Appellant has a further argument which is ingenious but not meritorious. This contention is that assuming the executor had the power to invade the marital trust assets to pay death taxes, this would not prevent the entire marital property from passing and being non-terminable because the payment of death taxes would not be to a "person," but only to the United States or to the state of Utah. In this connection the bank cites 26 U.S.C. § 7701(a)(1), which narrowly defines the term "person" to mean individual, a trust, estate, partnership, association, company or corporation. However, 26 U.S.C. § 7701(b) states that the definition given does not exclude other things which otherwise are within the meaning of the term. Thus, the definition does not exclude the United States or Utah. *Cf.* Sims v. United States, 359 U.S. 108 at 112, 79 S.Ct. 641 at 644-45 (1959).

Whether "person" includes a state or the United States depends on the legislative context in which the word is found. Ohio v. Helvering, 292 U.S. 360 at 370, 54 S.Ct. 725 at 727 (1934); Sims v. United States, *supra*, at 112, 645. The legislative purpose behind the estate tax marital deduction is to equalize estate tax treatment in community property and non-community property states. This allows up to one-half of decedent's adjusted gross estate to be passed to his surviving spouse free of tax liability. It contemplates, moreover, that the interest will be available for state taxation when the surviving spouse dies. Northeastern Pennsylvania Nat. Bank and Trust Co. v. United

States, 387 U.S. 213 at 221, 87 S.Ct. 1573 at 1578 (1967).

Thus, when considered in this context the United States and the state of Utah should not be, on the basis of technical reasoning, excluded from the term "persons," for to do this would be out of harmony with the marital deduction provision. As a practical matter, to accept the appellant's argument would carve out a judicial loophole which Congress did not intend to create.

It is then consistent with the purposes of the Act to regard the United States and the state of Utah as "persons" within the language of § 2056(b)(5). So considered, the terminable interest in question is exercisable in favor of persons other than the surviving spouse, and, at least to the extend of the death taxes, the marital trust does not qualify for the marital deduction.

We must conclude then, contrary to the executor's contention, that § 2056(b)(5) does not display a congressional intent that the marital share be deductible as an unreduced unit.

The judgment of the Tax Court is affirmed.

MOORE, Circuit Judge, dissenting:

When the testator asked an attorney (and presumably he did) to draw his will, he must have told him, judging by the will, that he wished to provide for his wife and set up a marital trust which would "maximize the estate tax deduction available under Section 2056 of the Internal Revenue Code." (Majority Opinion) He also "indicated a preference as to which assets were to go to the marital trust so that his surviving spouse would not have to be involved in decisions relating to the family business." (Tax Court Opinion) The usual clause for payment of funeral expenses, just debts, etc. was inserted but as a special directive, the testator directed that "all inheritance, estate and transfer taxes due by reason of my death shall be paid out of that portion of my estate which is not included in the Marital Trust to be administered by my Trustee . . .". The testator's instructions to his executor, whether attorney-drawn or layman-drawn, could not have been clearer.

However, mindful of the unexpected, which it is always wise to provide for in any document, testamentary or corporate, the testator added an "unless" proviso so that if in the executor's sole discretion and "in his best business judgment" the executor might think it advisable that "such taxes could be more prudently paid from any assets in my estate without respect to what is or is not included in the Marital Trust", then the executor would not be accused of a breach of trust if it did so. But before doing so, it was called upon to exercise its best business judgment, which judgment was to be exercised in its sole discretion. It was not the discretion of the Tax Commissioner, nor the Tax

Court, nor the Court of Appeals.

Little comment is necessary as to the applicable principles of law. The courts are to discover and enforce the will and intent of the testator. He can speak only through the document declaring his intent. Were he here today he would undoubtedly reaffirm what he thought he had clearly expressed.

Error becomes first noticeable in the Tax Court's opinion in its assumption that "decedent's will directed the executor in his sole discretion to pay death taxes without respect to what was or was not included in the marital trust." Quite to the contrary, he specifically directed that estate taxes "be paid out of that portion of my (his) estate which is *not* included in the Marital Trust . . ." (emphasis added).

An all-important prerequisite had to occur before the executor could invade the marital trust for this purpose. It had to exercise its "best business judgment." Had the executor been called to account for departing from the testator's wishes, it would undoubtedly have had to show cause as to the wisdom of this exercise and by adequate proof to justify the soundness of its judgment.

I cannot understand, nor agree with, the majority's statement that Article XII "expresses a preference for the payment of the taxes from that part of the estate not included in the marital trust." Nowhere in the Article is there any suggestion of "preference." Quite the opposite—the testator used words of command. Thus, he wrote, "I further direct . . ." and that the taxes "*shall* be paid out of that portion of my estate which is not included in the Marital Trust . . ." (emphasis added). These words I cannot reconcile with the majority's statement that "we do not have a

positive expression in the will" or "a positive direction that death taxes be paid from that part of the estate not included in the marital share . . .".

The courts should strive to carry out the wishes and intent of testators and not decree, in effect, that only if the testator writes, in substance, that "I direct that under no circumstances whatsoever shall any estate taxes be paid out of, or which in any way might diminish, the marital trust." True, the testator gave to his executor a contingent power to apply funds of the trust if it could justify its use as its "best business judgment" but this is a far cry from saying, as do the majority, that "the existence of the authority is out of harmony with the notion that the decedent firmly directed the executor to pay taxes out of funds other than marital ones so as in all circumstances to secure the greatest possible marital deduction."

The tax Court judge conceded that "under Utah State law the decedent's will must be interpreted to give effect to the decedent's expressed intention" but at the same time said that "the decedent clearly intended that his executor possess absolute power to commit the assets of the marital trust to the payment of death taxes if he saw fit to do so." Were the will to be properly interpreted, he should have said that the executor possessed a conditional power not to be exercised without a showing that the conditions had been met.

Furthermore, although the Commissioner is not foreclosed from making a federal assessment, the Tax Court judge acknowledged that "(w)hether any estate taxes are payable from the surviving spouse's interest is a matter governed by state law. (citing cases)" All parties in interest were before the District Court

(Utah), Probate Division, and by order of that Court the property was distributed in a manner which did not reduce the marital trust by any Federal estate of Utah inheritance tax. The federal government has received its full measure of tax from this estate. In my opinion it should honor the testator's wishes—not seek to override and frustrate them.

The legislative purpose of the marital deduction is the equalization of treatment of surviving spouses in commonlaw states with those in community property jurisdictions. Furthermore, there is a presumption that the marital estate will not be burdened with Federal tax. See *Estate of Amory Haskell* v. *Commissioner*. 58 T.C. 197 (1972). It is generally accepted that state law may determine who will pay the federal estate tax. *Riggs* v. *Del Drago*, 317 U.S. 95. Absent statutory authority from Utah placing the Federal tax burden or any part of it on the surviving spouse and absent clear language in the will indicating that the testator wishes the tax to be paid from property which would otherwise be included in the marital deduction, I would hold that the presumption of no tax burden and the clear intent of the testator to bequeath the maximum marital estate be given effect.

Since I believe that the decision today departs widely from the testator's expressed intent, I must dissent.

APPENDIX C

Section 2056 of the Internal Revue Code of 1954

SEC. 2056 BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of marital deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest*—

(1) *General rule.*— Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse; pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) *Interest in unidentified assets.*— Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) *Interest of spouse conditional on survival*

for limited period.— For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

(B) *Valuation of interest passing to surviving spouse.*— In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the

amount of a gift to such spouse of such interest were being determined.

(5) *Life estate with power of appointment in surviving spouse.*— In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor) of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.